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No. 285

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1953.

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FEDERAL INS. CO., *et al.*,
Petitioners,

—against—

ISBRANDTSEN CO., INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

HENRY N. LONGLEY,
F. HERBERT PREM,
Attorneys for Petitioners.

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IN THE

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OCTOBER TERM, 1953.

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—against—

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners:

Federal Insurance Company, United States Fire Insurance Company, St. Paul Fire & Marine Insurance Company, Home Insurance Company, Queen Insurance Company of America, Firemen's Insurance Company, Insurance Company of North America, Globe & Rutgers Insurance Company, Fireman's Fund Insurance Company, Hartford Fire Insurance Company, Aetna Insurance Company and Centennial Insurance Company

pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Opinions Below.

The unreported opinion of the District Court for the Southern District of New York appears in the record (at pp. 11 to 14). The Court of Appeals wrote no opinion; it entered a *per curiam* judgment reading: "Decree affirmed on opinion below" (Record, p. 23).

Jurisdiction.

The judgment of the Court of Appeals for the Second Circuit was filed on June 1, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Statement.

Your petitioners are marine underwriters who insured cargo shipped at Pearl Harbor, Hawaiian Islands, on the American S. S. "John Miller" for carriage to Piraeus, Greece. The respondent, as bare-boat charterer of that vessel, was the carrier of the cargo which petitioners insured. The suit is by the respondent against the petitioners to recover contributions in general average alleged to be due from the cargo in connection with a stranding of the vessel. As your petitioners executed general average guarantees, if cargo is liable to contribute in general average the liability is theirs; and if there is any such liability the amounts decreed below are correct.

The case was presented in the District Court on exceptions to the libel, the petitioners being satisfied

then as now that the libel accurately sets out all of the relevant facts. From the start, therefore, the case has presented only an issue of law. The facts set out below appear in the libel with attached charter party.

The "John Miller" was directed to load her cargo at Pearl Harbor. After her loading had been completed but before she had been cleared, the Navy desired her berth and offered to shift her to a mooring within Pearl Harbor pending clearance (Libel, Art. 8, R. 4). However, the carrier ordered the vessel to proceed from Pearl Harbor to an anchorage off Honolulu.

The "John Miller" departed from her Pearl Harbor pier at 4:08 p. m. on June 19, 1946, and went hard aground 79 minutes later off Honolulu by reason of the neglect or default of the master or the servants of the carrier in the navigation of the said steamship off Honolulu (Libel, Art. 15, R. 7).

When the "John Miller" departed from her pier at Pearl Harbor she did not embark on the contractual voyage to Piraeus: she could not then sail on that voyage because she had not been cleared at the Custom House. She moved to suit the carrier's convenience and in an effort to save it expense; and the negligent stranding some six miles from her Pearl Harbor pier, occurred during a maneuver preparatory to the vessel sailing on the voyage contracted for: if she had arrived at the anchorage ground off Honolulu toward which her navigation was directed, it was intended for the master to go ashore, clear his ship and then embark on the voyage to Piraeus (Libel, Art. 8, R. 5).

The stranding of the "John Miller" made her unseaworthy and the contributions claimed from your petitioners are to the expenses incurred by the carrier in pulling the vessel off her strand and restoring her to seaworthy condition so that she might sail on the voyage contracted for.

The distance from Pearl Harbor to the Honolulu Anchorage Ground by sea is approximately seven miles; and from Pearl Harbor to Honolulu, where the Custom House is located, is approximately six miles over the road (Libel, Art. 7, R. 3). "The steamship was at all times subsequent to departing Pearl Harbor and up to the time of the stranding had been within the customs district of Honolulu" (Libel, Art. 15, R. 7).

Rights between the carrier and the cargo are controlled by the terms of a charter-party (R. 9). That document is a contract for the carriage of cargo from one safe port in the Hawaiian Islands to Piraeus, Greece. It contains a Clause Paramount providing that the rights of the parties shall be governed by the Carriage of Goods by Sea Act (Title 46 U. S. C., secs. 1300-1315). The relevant provisions of that Act are as follows:

> (Sec. 1303) "(1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—
>
> "(a) make the ship seaworthy;
>
> "(2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.
>
> * * * *

"(8) Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and applications provided in this section, or lessening such liability otherwise than as provided for in this Act, shall be null and void and of no effect."

(Sec. 1304) "(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

"(a) Act, negect, or default of the master, mariner, pilot, or the servant of the carrier in the navigation or in the management of the ship."

THE QUESTION PRESENTED.

Is there anything in the Carriage of Goods by Sea Act which in the slightest degree impairs an ocean carrier's historic obligation to use due diligence to make his ship seaworthy at the inception of a voyage on which it contracts to carry cargo?

In our earliest admiralty decisions one outstanding basic principle was held to govern rights between cargo owners and ocean carriers: unless there is an explicit provision negating the implication, there is implied in every contract of ocean carriage an absolute warranty that when the carrying vessel embarks on the voyage contracted for, she shall be in all respects seaworthy.

The Edwin I. Morrison (1893), 153 U. S. 199, at pp. 210, 215;
The Caledonia (1894), 157 U. S. 124, at pp. 130, 137.

(Above cases citing prior leading authorities dating back to 1807.)

Work v. *Leathers* (1878), 97 U. S. 379, at p. 380;
3 Kent, Com. 205.

For many years in suits between cargo owners and carriers satisfaction of that implied absolute warranty of seaworthiness was held to be an ocean carrier's obligation. Later, ocean carriers not only customarily modified that implied absolute warranty but they also sought to escape virtually all liability by onerous and complex contractual provisions (*The Delaware*, 161 U. S. 459, at pp. 471-473). This led to the passage of the Harter Act,* section 2 of which (Title 46, sec. 191) makes invalid any contractual provision designed to impair a carrier's obligation "to exercise due diligence (to) properly equip, man, provision and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage * * *."

The Harter Act did not of itself modify the implied absolute warranty of unseaworthiness at the inception of the voyage; but it endorsed the validity of a contractual provision modifying that warranty to an agreement to exercise due diligence.

The Carib Prince, 170 U. S. 655, at p. 661.

* U. S. C. Title 46, secs. 190-194.

However, the authorities were clear that the implied absolute warranty of seaworthiness was so elemental that it would not be considered modified by a contractual provision unless the modification specifically negatived the implied warranty that the ship would be seaworthy *when she actually embarked on her voyage* (*The Caledonia*, 157 U. S. 124 at p. 137; *The Carib Prince*, 170 U. S. 655 at p. 659).

Prior to the judgment below in the present case, the decisions have been clear that the statutory obligation to exercise due diligence which may not be lessened, relates to the seaworthiness of a vessel *when she actually embarks on the voyage which she has contracted to make.* If, before the vessel actually embarks on the contractual voyage, negligence renders her unseaworthy, the carrier's obligation to exercise due diligence has not been satisfied.

The Caledonia, 157 U. S., at p. 133;
The Newport, 7 F. (2d) 452 (C. A. 9);
Ralli v. *N. Y. T. S. S. Co.*, 154 Fed. 286, at pp. 287-8 (C. A. 2);
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Wellesley Co. v. *Hooper*, 185 Fed. 733, at p. 738 (C. A. 9).

In *International Co.* v. *Farr Co.*, 181 U. S. 218, this Court held that the warranty of seaworthiness applies "before the commencement of the voyage and until it is actually commenced".

In *The Newport* (*supra*), a few minutes before a vessel's lines were cast off from her pier so that she might sail on her contractual voyage, an engineer's

negligence in manipulating valves caused steam to be led into a cargo hold and steam was pouring into the hold as her lines were cast off and she sailed. It was held that the vessel was unseaworthy through lack of due diligence when she sailed. The court pointed out that if the negligence had occurred immediately after sailing, it would have related to management for which the carrier would not be liable—but occurring when it did it was in obeying "an order looking to the beginning of the voyage, but the voyage had not begun" (7 F. (2d) at pp. 453-4).

In *Gilchrist Transportation Co.* v. *Boston Ins. Co.* (*supra*), after a vessel was loaded at Allouez, Wisc., she sailed from her pier a distance of seven miles to an anchorage off Duluth, Minn., where she lay some time awaiting completion of formalities before sailing on her voyage. While at this anchorage her cargo suffered damage because of negligence in her management. It was held that as the vessel had not embarked on the voyage contracted for no statutory exemption from liability was open to the carrier.

The other decisions cited are to the same effect. All these decisions were decided before the passage of the Carriage of Goods by Sea Act which became law in 1936; and as that Act is incorporated in the charter-party, it controls the rights and liabilities of the parties in the present case. The District Court held that as the Carriage of Goods by Sea Act provides unconditionally (U. S. C. sec. 1304 (2), *supra*, p. 5) that a carrier shall not be responsible for loss or damage resulting from negligence "in the navigation or in the management of the ship", the negligent stranding of the S. S. "John Miller" off Honolulu is one for which the carrier is not liable; and for that

reason the cargo is liable to contribute in general average to the expenses caused by that disaster because of the provisions of the bill of lading Amended Jason Clause reading as follows:

> "In the event of accident, danger, damage or disaster before or after commencement of the voyage resulting from any cause whatsoever, whether due to negligence or not, *for which, or for the consequence of which, the shipowner is not responsible, by statute or contract or otherwise,* the shippers, consignees or owners of the cargo shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the cargo." (Italics ours.)

The District Court said (R., p. 13) that under the Harter Act "the diligence of a vessel owner to make the ship seaworthy was relevant only to securing the advantages of par. 3 of that Act in the event of loss after such voyage commencement". We submit that this language does violence to Section 2 of that Act quoted *supra* (at p. 6).

The decision below is that under the Carriage of Goods by Sea Act, if the negligence of the carrier's servants makes his vessel unseaworthy before she embarks on her voyage, the cargo is required to contribute to the expense of restoring her seaworthiness so that she may sail on the voyage. We submit that this is in direct conflict with the requirement of Section 1303 (1) (a) of the Act that:

"*The carrier* shall be bound *before and at the*

beginning of the voyage, to exercise due diligence to—

(a) make the ship seaworthy; * * *." (Italics ours.)

Not only the decisions cited hereinabove but the provisions of the Carriage of Goods by Sea Act itself establish that the statutory exemption of a carrier from liability for negligence "in the navigation or in the management of a ship" relates to navigation or management after the vessel has embarked on her contractual voyage. Any other interpretation is in conflict with the decisions cited above which have interpreted exactly the same language appearing in Section 3 of the Harter Act; and with the carrier's statutory obligation under the Carriage of Goods by Sea Act to exercise due diligence to have his ship seaworthy "before and at the beginning of the voyage".

Indeed, in a prior case, decided in 1936, the Court of Appeals for the Second Circuit affirmed without opinion a decision of the Southern District of New York that the statutory exemption against liability for negligence in management provided by the Carriage of Goods by Sea Act (the British Act having the same provisions as our Act) only relates to management after "the vessel breaks ground or leaves her moorings in complete readiness for sailing and proceeding to sea" (*The Willowpool,* 12 F. Supp. 96, at pp. 99-100 (S. D. N. Y.); affirmed without opinion 86 F. (2d) 1002 (C. A. 2)).

In the instant case, in her maneuver to reach a convenient anchorage off the Custom House where she

might be cleared for her contractual voyage, the S. S. "John Miller" had proceeded from her loading berth a distance of approximately six miles before the negligent stranding made her unseaworthy. However, it is apparent that it was not the sailing of the vessel a short distance that was the basis of the decision below, except that her movement was the occasion of the negligence in navigation. Under the ruling, if a carrier's negligence in managing his vessel as she lies loading her cargo makes her unseaworthy, the cargo on board is obligated to contribute to the expense of restoring her to seaworthiness so that she may depart from her loading pier on her contractual voyage.

The carrier's obligation to have his vessel seaworthy when she embarks on her voyage (or to exercise due diligence to that end) is so basic under the Harter Act, the Carriage of Goods by Sea Act and indeed under all of the leading decisions for nearly a century before either Act, that we find it a shocking doctrine that cargo is required to contribute to the expense which a carrier incurs to satisfy his obligation to exercise due diligence to provide a seaworthy vessel at the inception of the voyage.

Reasons for Allowance of the Writ.

1. The decision below is in conflict with the basic principle which has governed rights between cargo owners and ocean carriers since our early judicial history.

2. The principle of the decision below is in conflict with the prior decisions of the Court of Appeals

for the Second Circuit and in conflict with the decisions now controlling in the Sixth and Ninth Circuits.

3. The Carriage of Goods by Sea Act specifically requires that an ocean carrier exercise due diligence to make his vessel seaworthy "before and at the beginning of the voyage".

4. The theory of the statutory exemptions covering negligence in navigation and management, etc., after a vessel sails on a voyage, is that after sailing the vessel is beyond control of the carrier's managing officers. The duty to exercise due diligence to provide a seaworthy vessel is satisfied in the port of loading, normally by the carrier's managing representatives. Any lessening of that obligation is contrary to the policy of our law; is certain to encourage negligence in providing safe, seaworthy vessels, and to increase cargo owners' burden in a manner which is indeed forbidden by statute.

5. Premiums for marine cargo insurance are rated on the premise that ocean carriers are under obligation to exercise due diligence to provide a seaworthy vessel at the inception of every voyage. On that assumption cargo underwriters are satisfied to assume the risk of disaster during a voyage causing damage to cargo or giving rise to the liability of cargo for contribution in general average. The decision below is in conflict with the basic principles which have historically governed the division of risks between those underwriters who insure cargo and those who insure carriers.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal

of this Honorable Court, directed to the United States Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court for its review and determination on a date certain to be therein named, a full and complete transcript of the record and all proceedings of the case entitled on its docket: Isbrandtsen Company, Inc., as demise charterer of the S. S. "John Miller" on behalf of itself and all other parties in interest, Libellant-Appellee, versus Federal Insurance Company, et al., Respondents-Appellants, Docket No. 22644; and that the judgment of the United States Court of Appeals for the Second Circuit be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Court may seem meet and just.

Respectfully submitted,

HENRY N. LONGLEY,
F. HERBERT PREM,
Attorneys for Petitioners.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

JAMES S. HEMINGWAY,
Attorney for Respondent.

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BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The Opinion of the District Court is unreported and is set forth in the Record at pages 11-14. The per curiam judgment of the Court of Appeals affirming the decree of the District Court appears on page 23 of the Record.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Question Presented

The question presented is whether under an Amended Jason Clause in a charter party cargo is obligated to contribute in general average with the carrier for expenses

of a general average nature incurred by reason of carrier's negligent navigation prior to the commencement of the voyage.

The Petitioners' statement on page 5 of its brief of the question presented is incorrect.

Statute Involved

The Petition sets forth on pages 4 and 5 all but one of the pertinent provisions of the United States Carriage of Goods by Sea Act. The section of that Statute relevant to the issues involved in this case omitted in the Petition is Section 4(1) which reads as follows:

> "Neither the carrier nor the ship shall be liable for loss * * * resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy * * *" (Title 46 U. S. C. Section 1304(1).)

Statement

The facts relevant to the issues of law are adequately set forth in the Petition commencing on page 2 through the first two paragraphs on page 4. We therefore proceed immediately to a discussion of the question of whether this court should grant a writ of certiorari to review the decision of the court below.

Argument

This case does not involve in any way the question of whether the Carriage of Goods by Sea Act (hereafter called the "Sea Act") impairs a carrier's obligation to use due diligence to provide a seaworthy ship. The only question is whether respondent is liable under Section 4(2)(a) of the Sea Act for the negligent navigation of the Master that resulted in the vessel's stranding off Honolulu.

Respondent's right to recover general average contribution from cargo is founded upon the terms of the Amended Jason Clause contained in the voyage charter made between Respondent and Petitioners' assured. The material portions of this Clause are:

> "In the event of accident * * * damage * * * before or after commencement of the voyage resulting from any *cause* whatsoever whether due to negligence or not for which or for the consequences of which the ship owner is not responsible * * * the * * * owners of the cargo shall contribute with the ship owner in general average * * *". (emphasis supplied)

By this Clause cargo has agreed to equate its obligation to contribute in general average with Respondent's responsibility for the accident giving rise to the general average claim. It is agreed that the expenses for which Respondent seeks contribution are of a general average nature. It is agreed that the *cause* of the damage or accident was negligent navigation on the part of the Master. If respondent is liable or responsible for the accident caused by the negligent navigation, cargo is not obligated to contribute in general average. If respondent is not liable or responsible for the accident caused by the negligent navigation, cargo is obligated to contribute in general average. The only question on the merits therefore is whether Respondent is "responsible" for the negligent navigation of the Master.

It is respectfully submitted for the reasons set out below that (1) there is no doubt whatsoever of the correctness of the decisions of the courts below on the merits; (2) there is no conflict between this decision and the decisions of any other court, either direct or in principle; and (3) there is no important question of federal law involved.

I

The Decision Below is Clearly Correct

The Petitioners' contention has already been fully explored and considered twice. First, by the District Court for the Southern District of New York (Judge John W. Clancy) and second, in the Court of Appeals (Judges Thomas W. Swan, Learned Hand and Augustus N. Hand).

The substance of the decision below is that under the Amended Jason Clause cargo is obligated to contribute in

general average if the carrier is not liable for the cause of the accident, and here the carrier was relieved of liability for the cause of the accident (negligent navigation) by Section 4(2)(a) of the Sea Act although the negligent navigation took place prior to the commencement of the voyage. The conclusion that the exception for negligent navigation in 4(2)(a) of the Sea Act applies before a voyage is commenced results from the fact that, unlike similar exceptions in the Harter Act, the availability of Sea Act exceptions is not conditioned on a showing of the seaworthiness of the vessel at the commencement of the voyage. Consequently under the Sea Act the exceptions are not limited to the period following the commencement of the voyage. This follows from the plain terms of the Sea Act.

It is very important to note that the lower court's decision rests on the terms of the contract beween the parties, the Amended Jason Clause, as well as the construction of Section 4(2)(a) of the Sea Act. The last full paragraph on page 9 of the Petition fails to mention the terms of the contract as one of the two basic elements in the decision.

II

There is no Conflict of Decision

There is no decision of the Second or any other Circuit involving the same or a similar set of facts. Consequently, the holding of this case does not in any way conflict with the holding of any other case. The "conflict" is said to be in principle. (Petition pp. 11-12)

The principle said to be involved is that which imposes on the shipowner a duty to use due diligence to make his vessel seaworthy. Five cases from the Second, Sixth and Ninth Circuits are cited in support of this principle. All of these cases involve the question of the liability of a carrier for damage to cargo and hold quite clearly that where cargo is damaged by reason of a carrier's failure to discharge its duty to provide a seaworthy vessel, cargo may recover. With this holding we, of course, fully agree. But the principle or rule laid down in those cases is not involved in the instant case.

This case involves the question of liability of cargo to contribute in general average *under an Amended Jason Clause*. As we have seen, under this clause the liability of cargo to contribute is made coincident with carrier's non-liability for the accident. Here the carrier's responsibility for the accident depends upon the terms of the Sea Act. Under the express terms of the Sea Act the Carrier is not liable for the consequences of negligent navigation. And it is agreed the cause of the accident was negligent navigation. The question of seaworthiness is not involved. In any event, even if it were, the Sea Act imposes responsibility on a carrier for unseaworthiness only in the event that the unseaworthiness *caused* the accident or loss. Here it is agreed that the accident was not caused by unseaworthiness but by negligence. This is the extent to which the carrier's duty to provide a seaworthy vessel is involved in this case.

Clearly the holding that cargo must abide by its agreement and contribute when the carrier is not under any liability under the Sea Act by reason of unseaworthiness or otherwise, does no violence to any principle imposing liability on the carrier to cargo by reason of unseaworthiness or other causes. In short this case in no way reduces or restricts the liability of a carrier for damage to cargo. It holds only that where cargo has unqualifiedly agreed to equate its obligation to contribute in general average with the carrier's non-liability for particular average, cargo should not later be able to complain that it made a bad bargain.

On page 10 of the Petition there is the suggestion that the decision conflicts with another principle or rule of law that the exception for negligent management or navigation only applies after the voyage has commenced. All but one of the cases cited by Petitioners in support of this proposition were decided under the Harter Act, which, for the reasons set out in the decision of the District Court, has no bearing on the scope of the exceptions in the Sea Act. *The Willowpool* 12F. Supp. 96 (S. D. N. Y.); affirmed without opinion 86F. (2d) 1002 (C. A. 2)—the one case arising

under the Sea Act—holds only that where cargo damage is caused by the unseaworthiness resulting from negligent management prior to the commencement of the voyage the carrier cannot rely on the exception for negligent management. This result is clearly correct under Section 4(1) of the Sea Act because the loss was caused by unseaworthiness. There is no conflict with our case because here the accident was caused by negligent navigation, not unseaworthiness.

III

There is no Important Question of Federal Law

Much of what has been said above under II applies here. The only Federal question concerns the scope of Section 4(2)(a) of the Sea Act. The lower court's construction of the Statute is in accordance with its plain meaning. Once it is decided that the Sea Act relieves a carrier of liability for negligent navigation prior to the commencement of the voyage all that remains is to give effect to the express terms of the Amended Jason Clause.

What has just been said covers "Reasons" 1, 2 and 3 advanced on pages 11 and 12 of the Petition.

The answer to "Reason" 4 on page 12 would appear to be that the Master, with respect to matters of navigation, is as far beyond the control of the carrier's managing officers after he leaves the dock as he is in the middle of the ocean.

Finally, with respect to "Reason" 5 it is difficult to understand in just what manner the level of insurance premiums should govern the construction of the Carriage of Goods by Sea Act and an Amended Jason Clause.

Conclusion

For the foregoing reasons it is respectfully submitted that this Petition for a writ of certiorari should be denied.

Respecfully submitted,

JAMES S. HEMINGWAY